CHU TAK FAI

v.

PP

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CRIMINAL APPEAL NO: K-05-40-94]
20 AUGUST 1998

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking - Defence - Duress - Whether established - Whether there was misdirection by trial judge*

This was an appeal against the decision of the High Court convicting the appellant of trafficking in drugs under s. 39B of the Dangerous Drugs Act 1952 ('the DDA'). According to the facts, the appellant, a male Chinese from Hong Kong, entered Malaysia from Thailand in a van. Upon a full body search of the appellant at the immigration control post at Bukit Kayu Hitam, he was discovered to be carrying a total of 17 packages containing heroin (2,125.4g). The appellant did not deny that he had physical possession of the 17 packages at the time and place stated in the charge. His defence was that he did so under duress. He said that he had been threatened by one Ah Meng (in Hong Kong) for failing to repay a loan in the sum of HK100,000. Ah Meng had apparently forced the appellant to carry the packages from Hong Kong to Malaysia via Bangkok – for otherwise his mother and sisters would be killed. According to the appellant, Ah Meng had informed him that the packages contained gold dust.

On appeal, counsel for the defence submitted that the trial court had failed to consider the defence from all angles – on the basis that the trail court had considered irrelevant matters such as: (i) the failure to produce the air ticket and foreign currencies; (ii) the cavalier attitude with which the appellant viewed any attempt on his part to escape from the duress during the ten-day stay in Bangkok, and the belated manner in which the accused explained in cross-examination why he did not try to escape; (iii) that the appellant did not attempt to explain to the relevant officer that the packages found on his body did not belong to him but to someone else; and (iv) failure of the appellant's sister to report to the Hong Kong police of the incident which happened and the unsatisfactory explanation she gave for such failure or omission.

Held:
Per Denis Ong JCA:

[1] The provision of the return air ticket and the foreign currency was relevant to and an essential part of the appellant's entire story of acting under duress and the trial judge had properly directed his mind to it when dealing with the submissions. The air ticket and foreign currency should have been tendered as real evidence and since this was not done, it was not unreasonable for the trial court to conclude that it was not convinced of the truth of their existence. It was open to the trial court to reject such oral evidence as a fabrication and an afterthought of untruthful witnesses. It was entitled to do so and there was therefore no misdirection on that point.

[2] An opportunity for a survival bid in the face of a genuine threat to one's life can in no sense be regarded as trivial. It was not an adverse comment and there was therefore no misdirection by the trial court.

[3] Whether the appellant carried the packages on his own behalf or on behalf of someone else was a point directly relevant to the determination of whether he was the trafficker as charged, to the rebuttal of the mandatory presumption under s. 37(da)(i) of the DDA. If it was true that the appellant did explain to the relevant officer that he carried them on someone else's behalf, then it was for him to say so frankly and timely in his evidence-in-chief and not to wait until his cross-examination. Such delay must affect the credibility of or the weight to be attached to that piece of evidence taken alone or together with other evidence elicited also in cross-examination concerning his air ticket and no bid to escape from duress because he thought they were trivial matters.

[4] It was apparent that the trial court was not satisfied with the appellant's sister's answer and took it upon itself to question her as to her purpose of going to the police station in Hong Kong after she came to know that the appellant was arrested in Malaysia. The appellant's sister should have promptly reported the incident to the Hong Kong police. She gave no satisfactory explanation for her failure or omission to do so. The trial court therefore was well justified to find that the appellant's sister was not a truthful witness, to disbelieve her evidence and to reject the evidence of the supposed incident as a fabrication and an afterthought.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah satu rayuan terhadap keputusan Mahkamah Tinggi yang mensabitkan perayu kerana mengedar dadah di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB'). Menurut fakta-fakta kes tersebut, perayu, seorang lelaki berbangsa Cina daripada Hong Kong telah memasuki Malaysia daripada Thailand dengan sebuah van. Setelah menjalankan pemeriksaan seluruh tubuh perayu di pusat pemeriksaan imigresen di Bukit Kayu Hitam, beliau telah didapati membawa sejumlah 17 bungkusan yang mengandungi dadah jenis heroin (2,125.4g). Perayu tidak menafikan bahawa beliau mempunyai pemilikan secara fizikal 17 bungkusan pada waktu dan tempat yang dinyatakan dalam pertuduhan itu. Pembelaannya adalah bahawa beliau telah melakukan sedemikian di bawah dures. Beliau berkata bahawa beliau telah diugut oleh seorang bernama Ah Meng (di Hong Kong) kerana gagal untuk membayar balik pinjaman berjumlah HK100,000. Ah Meng telah nampaknya memaksa perayu supaya membawa bungkusan itu daripada Hong Kong ke Malaysia melalui Bangkok – kerana jika tidak, ibu serta adik-adik perempuannya akan dibunuh. Menurut perayu, Ah Meng telah memaklumkan beliau bahawa bungkusan-bungkusan itu mengandungi serbuk emas.

Ketika rayuan peguam bagi pihak pembelaan berhujah bahawa hakim perbicaraan telah gagal mempertimbangkan pembelaan itu dari kesemua sudut – atas dasar bahawa mahkamah perbicaraan telah menimbangkan perkara-perkara tidak relevan seperti: (i) kegagalan untuk mengemukakan tiket kapal terbang dan mata wang asing; (ii) sikap angkuh yang dipandang oleh perayu terhadap sebarang percubaan olehnya untuk melarikan diri daripada dures ketika 10 hari tinggal di Bangkok dan dengan cara tertangguh di mana tertuduh telah menjelaskan dalam pemeriksaan balas mengapa beliau tidak cuba melarikan diri; (iii) bahawa perayu tidak cuba untuk memperjelaskan kepada pegawai-pegawai yang relevan bahawa bungkusan-bungkusan yang didapati pada tubuhnya bukan kepunyaan beliau tetapi kepunyaan orang lain; dan (iv) kegagalan adik perempuan perayu untuk memembuat laporan kepada polis Hong Kong mengenai peristiwa yang telah berlaku dan penjelasan yang tidak memuaskan yang telah diberikan olehnya kerana kegagalan atau kelalaian yang sedemikian.

Diputuskan:
Oleh Denis Ong HMR

[1] Peruntukan tiket ulang-alik kapal terbang dan mata wang asing merupakan bahagian yang penting serta relevan kepada keseluruhan cerita perayu kerana bertindak di bawah dures. Hakim perbicaraan telah dengan sempurnanya menumpukan pemikirannya ketika menguruskan penghujahan-penghujahan peguam dan pendakwa raya. Tiket kapal terbang dan mata

wang asing seharusnya dikemukakan sebagai keterangan sebenar dan oleh kerana perkara ini tidak dilakukan, ianya adalah wajar bagi mahkamah perbicaraan untuk memutuskan bahawa ianya tidak yakin mengenai kebenaran kewujudan mereka. Ianya terbuka untuk mahkamah perbicaraan bagi menolak keterangan lisan yang sedemikian sebagai suatu rekaan dan sesuatu yang difikirkan kemudian oleh saksi-saksi yang tidak jujur. Ianya berhak untuk melakukan sedemikian dan dengan itu tiada salah arahan mengenai perkara itu.

[2] Sesuatu peluang percubaan untuk menyelamatkan diri dalam sesuatu ugutan kepada nyawa seseorang tidak mustahil dianggapkan sebagai tidak penting. Ianya bukan suatu ulasan yang bertentangan dan dengan itu tidak terdapat salah arahan oleh mahkamah perbicaraan.

[3] Samada perayu membawa bungkusan-bungkusan tersebut itu bagi dirinya sendiri atau bagi pihak yang lain adalah suatu perkara yang secara langsung relevan kepada penentuan samada beliau adalah pengedar seperti yang dituduh, demi untuk mematahkan tanggapan mandatori di bawah s. 37(da)(i) ADB tersebut. Jika ianya benar bahawa perayu sesungguhnya telah menjelaskan kepada pegawai relevan tersebut bahawa ianya telah membawa dadah tersebut bagi pihak seseorang, maka ianya adalah terpulang kepada beliau untuk mengatakan sedemikian dengan jelas dan tepat pada masanya dalam keterangan utama dan tidak menantikan sehingga pemeriksaan balasnya. Kelewatan sedemikian semestinya menjejaskan kebolehpercayaan akan atau penekanan yang diberikan kepada keterangan itu yang dipertimbangkan sendiri atau bersama-sama keterangan lain yang dibangkitkan juga dalam pemeriksaan balas berhubung dengan tiket kapal terbangnya dan tiada percubaan untuk melarikan diri daripada dures kerana beliau menganggapkannya sebagai perkara-perkara tidak penting.

[4] Ianya jelas bahawa mahkamah perbicaraan tidak berpuas hati dengan jawapan adik perempuannya dan berpendapat bahawa mahkamah haruslah menyoalkannya berhubung dengan tujuannya ke balai polis di Hong Kong selepas beliau mengetahui bahawa perayu telah ditahan di Malaysia. Adik perempuan perayu seharusnya telah melaporkan peristiwa itu dengan serta merta kepada polis Hong Kong. Beliau telah tidak memberikan penjelasan yang memuaskan di atas kegagalannya berbuat demikian. Dengan itu wajar bagi mahkamah perbicaraan memutuskan bahawa adik perempuan perayu bukannya saksi yang jujur, untuk tidak mempercayai keterangannya dan menolak keterangan mengenai peristiwa yang dikata itu sebagai satu rekaan dan perkara yang difikirkan kemudian.

[Rayuan ditolak.]

Cases referred to:
Alcontra Ambrose Anthony v. PP [1996] 1 MLJ 209 ***(refd)***
Derrick Gregory v. PP [1988] 1 CLJ 69 ***(refd)***
Director of Public Prosecutions for Northern Ireland v. Lynch [1975] AC 653 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073 ***(refd)***
Mohamed Yusof v. PP [1983] 2 MLJ 167 ***(refd)***
Ng Chai Kem lwn. PP [1994] 2 CLJ 593 ***(refd)***
R v. Teichelman [1981] 2 NZLR 64 ***(refd)***
Reg v. Hudson [1971] 2 QB 202 ***(foll)***
Reg v. Sharp [1987] 1 QB 853 ***(foll)***
Subramaniam v. PP [1956] 22 MLJ 222 ***(refd)***
Tan Seng Ann v. PP [1949] 15 MLJ 87 ***(refd)***
Teng Boon How v. PP [1993] 4 CLJ 545 ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(i), 39B
Penal Code, s. 94

For the appellant - V Sithambaran (G Ravishankar with him); Kumar, Sitham & Co
For the respondent - Azahar Mohd; Attorney General's Chambers

[Appeal from High Court, Alor Setar; Criminal Trial No: 45-8-93]

Reported by Mariette Peters-Goh

JUDGMENT

Denis Ong JCA:

This is an appeal against the decision of the High Court at Alor Setar convicting the appellant of trafficking in 2,125.4 grams of heroin on his own behalf under s. 39B of the Dangerous Drugs Act 1952 (Act 234). After hearing arguments from Mr. V. Sithambaram of learned counsel for the appellant and without hearing the learned deputy public prosecutor, we dismissed the appeal and affirmed the conviction and sentence of the High Court. We now give our reasons.

The following evidence was adduced by the prosecution at the trial. On 30 April 1993 the appellant, a male Chinese from Hong Kong and holder of a British Passport entered Malaysia overland from neighbouring Thailand in a van driven by a Thai national named Uthai Onkhong. In the same van were also eleven Caucasian visitors to Malaysia. The appellant was dressed in a jersey and a pair of trousers. Upon a full body search of the appellant at the immigration control post at Bukit Kayu Hitam, Kedah on the Malaysian side of the border with Thailand, he was discovered by L/Cpl. Abdul Rahim bin Hashim (PW4) to be carrying a total of 17 packages tucked in the armguards, thighguards and panties that he wore under his jersey and trousers at the time

of the search. Upon removal of the wrappers, these packages were found to contain small rectangular slabs of compact materials whitish in colour, suspected to be heroin, a dangerous drug listed in Part III of the First Schedule to Act 234. Consequently they were seized and the appellant arrested. Upon analysis of the materials by Shaharudin b. Hassan (PW3) the Government chemist, they were indeed found to be heroin of a nett weight of 2,125.4 grams.

On such evidence, the trial court made findings of fact that the appellant was found to have had under his control at the time and place stated in the charge the 17 packages and further that they contained 2,125.4 grams of heroin. It thus ruled that s. 37(d) and (da) applied. The appellant was thus presumed to have been in possession of the dangerous drug contained in the 17 packages and to have known the nature of the drug. Since the drug was heroin and well above 15 grams in weight, the appellant was presumed under s. 37(da)(i) to be trafficking in heroin.

The appellant did not deny that he had physical possession of the 17 packages at the time and place stated in the charge. His defence was that he did so under duress. He denied that they contained dangerous drug. He denied knowledge of the heroin found in the 17 packages. He believed that such packages contained gold dust as he was informed by one Ah Meng in Bangkok. He explained on oath how he came to have possession of the 17 packages. He said that it all started on 18 April 1993 at about 2am when four men came to his apartment on the second floor Block E, 59 Wan Hong Street, Kowloon, Hong Kong where the appellant lived with his mother named Mah Chor Oh and two sisters one of whom was named Chu Kwai Fong (DW2). One of the four men, known to him as Ah Seng, demanded from his mother immediate repayment of a loan of HK$50,000 plus interest totalling HK$100,000 which loan his mother took from Ah Seng to pay for the cost of eye surgery performed on his maternal grandmother. As his mother was unable to pay immediately, Ah Seng, who was armed with a pistol, threatened to kill them all. He reasoned with Ah Seng that the debt was monetary and there was no necessity to take their lives. Ah Seng then pointed the pistol at him and said that to spare their lives, the appellant was required immediately to follow him and his men. The appellant refused and was hit by Ah Seng with the butt of the pistol. He was told to pack immediately and to bring along his passport and follow Ah Seng and his men; otherwise the entire family would be killed. The appellant said that he was very afraid at that moment – afraid that his mother, his two sisters and himself would be killed. In the main, this portion of the evidence of the appellant was consistent with the evidence of DW2. So he packed his clothing and passport into a small bag and was

taken to another house in a car, blindfolded. Inside the car he was relieved of his bag and passport. At the living room of the house, his blindfold was removed and Ah Seng pointed the pistol to his head saying that if the appellant's brother-in-law, who allegedly owed him HK$1 million in gambling debt, were in the apartment, he would have killed him instantly. Again, the appellant was hit on the face and body with the butt of Ah Seng's pistol and was repeatedly reminded of his mother's debt. That night he was locked up in a room at the back of the house. He had two meals in that room on 18 April 1993: one at 11am and another at 11pm, brought to him by Ah Seng; and it was on the second occasion that he was informed by Ah Seng that the next day, Ah Seng would call someone (known afterwards as Ah Meng) to accompany the appellant to Thailand to assist Ah Seng in bringing something. And when the appellant enquired what it was, Ah Seng replied that for the moment it was unnecessary for the appellant to know. Ah Seng told him to do as he was told and warned him against any attempt to escape. And if the job was done, his mother's debt would be discharged. But if he refused to do the job, he would be killed instantly followed by his mother and two sisters.

The next day 19 April 1993 at about 9am Ah Seng drove Ah Meng and the appellant in a car to the airport in Hong Kong. On the way the appellant learnt of Ah Meng's name for the first time when Ah Seng called him by that name. In the car, Ah Seng again reminded the appellant against any bid to escape. Ah Seng dropped them off at the airport and drove off. Ah Meng put his arm round the appellant's shoulder and whispered to him not to run away for he would be killed instantly. Together they went to buy their air tickets to Bangkok and waited in the public concourse for about half an hour before they checked-in and boarded the plane at 11am. The appellant said that there was no opportunity for him to escape whilst at the airport as Ah Meng held on to his shoulder and constantly reminded him against any escape bid. The appellant said that he feared for his own safety and that of his family and the nature of job he was to undertake in Thailand.

Landed at Bangkok airport about 3pm the same day and after Thai immigration clearance they boarded a taxi which took them to the first hotel in Bangkok where they were accommodated in a room from 19 April 1993 to 24 April 1993. Once inside the taxi, Ah Meng took back the appellant's passport after the latter had used it for Thai immigration clearance in order to prevent him from making any bid to escape. They checked into the room after registering at the hotel counter and inside the room the appellant overheard a telephone conversation in Cantonese between Ah Meng and Ah Seng in Hong Kong in which the former enquired from the latter what his plans were for the appellant and in which the former informed the latter that he would call daily at 8pm. Shortly afterwards the telephone in the room rang. Ah Meng answered the

phone and spoke to the caller in the Thai language. The appellant said that he knew not what transpired in the phone conversation as he was not conversant with the Thai language. An hour later a Thai man showed up at the door of the room and was ushered in by Ah Meng. They conversed in Thai before they all went out to eat. The Thai man returned the next day 20 March 1993 to talk further with Ah Meng and in the midst of their conversation, Ah Meng informed the appellant not to attempt to escape for if he did, the Thai man would kill him instantly. The appellant said that he was very frightened as both men were seen to be armed with pistols. They went shopping after that and Ah Meng bought for the appellant two T-shirts, a pair of trousers, toiletries and a suitcase black in colour. That night Ah Meng telephoned Ah Seng in Hong Kong to inform that "that thing was not ready" and that he would phone him daily.

On 24 April 1993, the Thai man returned and after a brief conversation with Ah Meng in the Thai language, they checked out of the first hotel and into a second hotel led by the Thai man. Ah Meng reported to Ah Seng by phone of the change in hotel and informed him that "that thing had not arrived" and that he would phone again.

On 29 April 1993 the Thai man came to the second hotel carrying with him a plastic bag. Upon emptying its contents on the bed, the appellant saw a pair of armguards, a pair of thighguards and a pair of knickers (panties). The appellant said he saw bulges in the armguards, thighguards and panties but was unable to see what were inside. Upon being asked to wear them, the appellant enquired as to the contents of the bulges and was informed by Ah Meng that they contained gold dust which the appellant was required to bring to Penang. The appellant then asked why he should be required to wear them in that manner. To that Ah Meng replied that bringing gold dust into Malaysia was against the law and for that reason the appellant was required to wear the armguards, thighguards and panties containing the gold dust. The appellant retorted that he did not want to do anything against the law. On hearing this, Ah Meng pointed his pistol at the appellant and said that if the appellant helped him do the job, he would discharge the debt owed by the appellant's mother, but if the appellant was unwilling to do so, Ah Meng would shoot him to death and telephone Ah Seng to kill the appellant's mother and sisters. The appellant said that at that moment he was very afraid; he had no alternative but to wear the armguards on both arms, the thighguards on both thighs and the panties over his brief in the manner as PW4 saw them on him at the time of the body search. Thereafter, Ah Meng and the appellant checked out of the second hotel and together with the Thai man, ate in town. The appellant said that he did not eat as he had no appetite, being preoccupied with the thought of safety for himself, his family members and that of doing

something against the law. After Ah Meng and the Thai man had eaten, all three proceeded by taxi to an unidentified place where there was a van and an unidentified Caucasian man nearby. The Thai man approached the Caucasian and after a brief conversation between them, both advanced towards Ah Meng and the appellant. The Thai man spoke to Ah Meng in the Thai language after which Ah Meng informed the appellant that the Caucasian was to accompany the appellant to Penang. The appellant was further reminded by Ah Meng not to run away for if he did, the Caucasian would kill him instantly. Ah Meng informed the appellant that the van was to take both the appellant and the Caucasian to Penang. Before boarding the van, Ah Meng gave the appellant some U.S. dollars, Thai Baht, Hong Kong dollars and Dutch guilders to purchase his return air ticket from Penang to Bangkok. The appellant also received from Ah Meng his passport and his return air ticket for the Bangkok/ Hong Kong sector.

The appellant parted company with Ah Meng and the Thai man and boarded the van followed by the Caucasian. In the van, the appellant sat between the driver and the Caucasian and their journey to Penang overland started. At about 7.00 o'clock that evening their van stopped at a place for refreshments. Here, the appellant and the Caucasian switched from the van to a big bus. The appellant said that at this juncture it had occurred to him to run away but was too scared at the thought of instant death at the hands of the Caucasian who was beside him. The bus drove on through the night and the appellant said that he slept through this stretch of the journey until 7am the next day 30 April 1993 when the bus stopped at a place for them to have breakfast and to change to a van again. After breakfast, the appellant and the Caucasian boarded the van together with eleven other Caucasian passengers. Inside the van the Caucasian did attempt to converse with the appellant in English but he was unable to respond as he did not understand English. The van stopped at two other places including the Thai border immigration checkpoint before crossing into Malaysia.

Upon arrival at the Kompleks Bukit Kayu Hitam, Kubang Pasir, Kedah in Malaysia, all passengers disembarked from the van, collected their own luggage and obtained immigration entry forms to be completed for Immigration purposes. The appellant collected the form and said that the Caucasian assisted him to complete it as he was unable to do so. He was behind the Caucasian and last in the queue to have his passport endorsed. Thereafter, he followed the other passengers when a police man gestured to him by hand. Carrying two pieces of luggage with him the appellant proceeded towards the policeman and at the scanning machine, was further gestured to open the luggage for inspection. At this point in time according to the appellant all other passengers including the unidentified Caucasian had already cleared immigration

formalities and were outside the zone. His luggage was opened and inspected but nothing incriminating was found. The appellant was then taken to the Travel Control Officer's room where he was asked by PW4 in the presence of PW7 and L/Cpl Wan Rani to take off his trousers, panties and jersey and to remove the thighguards and armguards. He complied and placed them all on the floor. PW4 picked up the armguards, thighguards and panties and placed them on the writing desk in that same room. Then PW4 separated and removed the packages from the armguards, thighguards and panties and placed them on the writing desk. The appellant then said that for the first time he saw that the packages were wrapped in brown paper. The appellant said that PW4 did not inform him there and then what the contents of the packages were but to his knowledge the packages contained gold dust so he was told by Ah Meng. Except for the trousers returned to him to wear, all other items were retained by PW4. He said that he was inside the room for about two hours before Insp. Osman entered at about 6pm. He was then taken to the Police Station and arrived there at 8pm. He said that from the time he was in Bangkok to the time he was detained in the Police Station to his knowledge the contents of the packages were gold dust and he did not know that such packages contained heroin.

The appellant and DW2 did not impress the trial court as truthful witnesses and it was not convinced of the truth of the story of the appellant. It did not accept that Ah Seng, Ah Meng, the Thai man and the unidentified Caucasian existed in reality. To the trial court they were fictitious characters and that the entire story of duress was a fabrication and an afterthought.

Assuming that his story was credible, the trial court reasoned that at the time when the appellant was subjected to a body search at the Travel Control Officer's room in the presence of PW7, PW4 and L/Cpl Wan Rani there was no reasonable basis for the appellant to fear instant death from the unidentified Caucasian who was not present in the room. Viewing the circumstances objectively and having regard to the requirements of the law, the trial court held that the appellant failed to establish his plea that he acted under duress which was imminent, extreme and persistent.

For the same reasons which it gave in rejecting the appellant's story, the trial court held further that, on the balance of probabilities, the appellant failed to rebut the presumption that the packages he carried contained heroin.

At the outset of the hearing, learned counsel for the appellant informed us that the appellant did not dispute that he was in possession of the 17 packages found in the armguards, thighguards and panties which he wore at the time of the body search on him. Learned counsel said that what the appellant disputed was knowledge of the drugs namely, heroin.

Counsel's main ground of attack was the approach in the judgment of the trial court. He submitted that the trial court failed to consider the defence from all angles and its legally flawed reasoning had occasioned a failure of justice. He argued that the four reasons given for the rejection of the defence of duress constituted a misdirection by the trial court. On the first reason namely the existence or otherwise of the return air ticket for the Bangkok/Hong Kong sector and of the various foreign currencies allegedly handed over by Ah Meng and received by the appellant before they parted company on 29 April 1993 and allegedly recovered by the police from the trouser pocket of the appellant at the material time of the body search on him, counsel said that that was not a consideration relevant to the defence of duress.

There was no mention in the evidence in chief or cross-examination of PW4 or PW8 of the recovery of such air ticket or foreign currencies from the trouser pocket of the appellant at the material time of the body search or subsequently. Evidence concerning the existence of these items was introduced by the appellant.

The trial court stated in its judgment that both the air ticket and the foreign currencies were important to the prosecution as exhibits to be produced at the trial and equally crucial to the appellant. Before us, counsel disagreed with the trial court that they were crucial. He said that they were irrelevant to the consideration of the appellant's defence of duress.

It must be remembered that the appellant hailed from Hong Kong and to Hong Kong he must return upon completion of the mission. His evidence was that his airfare to Bangkok and his food, hotel accommodation and the 17 packages which he carried on his body were all financed and arranged by Ah Seng and Ah Meng. He was also given a return air ticket for the Bangkok/Hong Kong sector and various foreign currencies by Ah Meng to pay for his airfare from Penang (where the packages were to be delivered to the Caucasian) to Bangkok. Given those circumstances only, without more, firstly, the appellant would in law, be regarded not as carrying the packages on his own behalf with reference to the charge but on behalf of Ah Seng or Ah Meng or both, either as their servant or bailee. And if anyone was the smuggler of gold dust or the trafficker of heroin, he was Ah Seng or Ah Meng or both and not the appellant. The appellant did not dispute that he was the carrier of the 17 packages and was in possession of them. It was his case secondly, that he was the reluctant carrier (ie, impliedly, not their servant or bailee) having been compelled by Ah Seng and Ah Meng to carry those packages, against his will, under threat of death to himself and his family members if he did not do so. They paid and arranged for his air ticket food and accommodation from Hong Kong to Penang, and *vice-versa.* Thus in our view, the provision of the return

air ticket and the foreign currency were relevant to and an essential part of the appellant's entire story of acting under duress and that the trial court had properly directed its mind to it when dealing with the submissions of the learned deputy public prosecutor and counsel in this regard.

It is common knowledge that air tickets and foreign currencies exist in the form of documents, notes and coins. It is also clear from the Appeal Record at pp. 330D-E, 440E-441D, 442B-D, 443, 472D-F, 473A and 476E that there was a dispute, not as to the contents of the air ticket or the foreign currencies but, as to the factual existence of the return air ticket for the Bangkok/Hong Kong sector and of the various foreign currencies. The appellant said that they existed in fact; the respondent submitted otherwise and maintained that they were a fabrication and an afterthought. Now, whether or not they existed in reality was an issue of fact for the trial court to find and the burden was on the appellant to prove on the balance of probabilities that they actually existed. Such air ticket and foreign currencies if they actually existed, would constitute real evidence and the proper way to prove their existence was to tender them as exhibits at the trial. However, what the appellant did or attempted to do at the trial, was to substitute oral evidence given by himself and by DW2 for the actual existence of the air ticket and of the foreign currencies instead of having them produced as real evidence. The question then was why were they not produced. The appellant in cross-examination explained initially that the police seized them from his trouser pocket at the time of the body search on him and did not return them to him and he was unable to identify the police officer who did the seizure. In re-examination, he said that he received them back from the police and that he had handed them to DW2 to be taken home to Hong Kong. DW2 confirmed that she received them from the appellant but did not produce them at the trial for the reason that she left them at home in Hong Kong.

In our view, in the absence of real evidence of the air ticket and foreign currencies, it was not unreasonable for the trial court to conclude that it was not convinced of the truth of their existence. Even though not so convinced, was it more probably true than not in the light of the oral evidence of the appellant and DW2 that such air ticket and foreign currencies existed in reality. If they were not returned to him by the police as he had said initially in cross-examination, then, it might well be said that he was prevented from producing them as exhibits since the police would have custody of them. However, in re-examination the appellant admitted that he received them back from the police and had handed them over to DW2. In that event, the air ticket and the foreign currencies were in the appellant's possession and custody initially and subsequently in DW2's. In that situation, the appellant and DW2 were in a position to tender them as exhibits. They were not lost or could not be found.

The only excuse given by DW2 for not producing them as exhibits was because she had left them at home in Hong Kong. In our view that excuse was neither a satisfactory nor a reasonable explanation. In the light of the appellant's defence of duress coupled with the timing of disclosure for the first time, in his defence, of the alleged existence of the air ticket and foreign currencies, it was open to the trial court to reject such oral evidence as a fabrication and an afterthought of untruthful witnesses. It was entitled to do so and in our view there was no misdirection on that score.

The second reason for the rejection by the trial court of the defence of duress was the cavalier attitude with which the appellant viewed any attempt on his part to escape from the duress during his 10-day stay (ie, from 19 April 1993 to 29 April 1993) at the two hotels in Bangkok and the belated manner in which the appellant explained in cross-examination why he did not try to escape. It has been said by the House of Lords in *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] AC 653 at p. 668 per Lord Morris of Borthy-Guest that:

> Where duress is in issue many questions may arise such as whether threats are serious and compelling or whether (as on the facts of the present case may specially call for consideration) a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape'.

And the Court of Appeal in *Reg. v. Sharp* [1987] 1 QB 853 said at p. 857 per Lord Lane CJ:

> No one could question that if a person can avoid the effects of duress by escaping from the threats, without damage to himself, he must do so. In other words, if there is a moment at which he is able to escape, so to speak, from the gun being held at his head by Hussey, or the equivalent of Hussey, he must do so.

In *Reg. v. Hudson* [1971] 2 QB 202 (CA) at p. 206, Lord Parker CJ said:

> This appeal raises two main questions; first, as to the nature of the necessary threat and, in particular, whether it must be 'present and immediate'; secondly, as to the extent to which a right to plead duress may be lost if the accused has failed to take steps to remove the threat as, for example, by seeking police protection.

And at p. 207 *(ibid)* he continued:

> In the opinion of this court it is always open to the Crown to prove that the accused failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective, and that upon this being established the threat in question can no longer be relied upon by the defence.

From these excerpts quoted, it would be observed that one issue which the trial court must consider was whether there was opportunity which was reasonably open to the appellant in our present case, to render the death threat to himself ineffective, by a safe avenue of escape or by seeking police protection. In his evidence in chief, there was nothing to suggest that the appellant was not free to escape from the two hotel rooms which he shared with Ah Meng in Bangkok. Asked in cross-examination why he did not attempt to escape when Ah Meng visited the toilet or when the latter was asleep at night, the appellant answered that in the first hotel, he was cuffed to a towel rail each time Ah Meng was engaged in the toilet and in the second hotel, he was cuffed to a chair; and when Ah Meng was asleep at night, he placed his pistol and the appellant's passport under his pillow. Asked further as to why he did not say so in his examination-in-chief, the appellant answered that matters like buying a ticket and going to the toilet were trivial matters. The trial court rejected his explanation as an afterthought. Referring to the 4th, 5th and 6th holding of the Supreme Court in *Teng Boon How v. Pendakwa Raya* [1993] 4 CLJ 545; [1993] 3 MLJ 553 which he cited, the complaint of learned counsel for the appellant was that the trial court misdirected itself by taking into consideration the belatedness of the appellant's explanation given for the first time in his cross-examination and by the adverb "surprisingly" at p. 498 of the Appeal Record, had commented adversely against him without regard for the appellant's right to remain silent and that the trial court was not to draw an inference of guilt from such silence. In our view there was no merit in the complaint. As we had just said, nothing was mentioned in his evidence in chief about any escape bid by the appellant and except for the oral threats to his life uttered by Ah Meng, there appeared to be nothing to prevent the appellant from escaping particularly when Ah Meng was engaged in the toilet or was asleep at night in the absence of any third person keeping watch over the appellant. As was said by Lord Lane CJ in the excerpt quoted from *Sharp's* case *(supra)* if there was a moment at which he was able to escape from the gun being held at his head by Ah Meng, the appellant must do so. And his right to plead duress might be lost if the appellant failed to take steps to remove the threat by seeking police protection. Naturally, the proper time to say in evidence why he did not try to escape on those occasions would be in his evidence in chief if duress was real and not wait until they had to be elicited in cross-examination. In any event, as was said in *Hudson's* case *(supra)* it was open to the learned deputy public prosecutor to prove that the appellant failed to avail himself of some opportunity to escape or to seek police protection which was reasonably open to him to render the threat ineffective. It was a fact that the deputy public prosecutor cross-examined the appellant on his effort to escape and it was from his answers that the appellant revealed that he regarded any opportunity to escape as trivial. The facts of

our present case were thus distinguishable from those in *Teng's* case *(supra)*. There was no question of a cautioned statement in our present case, 1D27 having been ruled inadmissible after a trial within a trial. Whether or not the appellant should have disclosed in a cautioned statement why he made no attempt to escape or to seek police protection in a cautioned statement was not an issue in his trial. Hence his right to silence did not arise in that context or at all. The particular issue which arose in his trial was whether having elected to give sworn evidence, why did the appellant not disclose in his examination-in-chief the reasons why he did not attempt to escape or to seek police protection until in cross-examination. Only in that limited sense was his explanation "belated". The learned trial judge did not descend into the arena of the prosecutor as in *Teng's* case *(supra)* and did not ask a single question bearing on the topic of why the appellant made no attempt to run away or to seek police protection. All questions on that topic were asked by the deputy public prosecutor as it was open to him to do so. What the trial court did was essentially to evaluate the answers of the appellant on that topic having regard to the submissions of learned counsel and the deputy public prosecutor. The trial court disbelieved the appellant's evidence and concluded that duress in Bangkok was an afterthought. In so doing, it had used the adverb "surprisingly" perhaps not inaptly to show the court's disbelief at the cavalier manner with which the appellant perceived the seriousness of trying to escape if he was genuinely under duress. Any opportunity for a survival bid in the face of a genuine threat to one's life could in no sense be regarded as "perkara kecil" or trivial by any ordinary sensible person. It was not an adverse comment nor was it intended by the trial court to be one. In the premises we were of the view that there was no misdirection by the trial court.

Likewise and for the same reasoning we found no merit in learned counsel's complaint of the third reason of the trial court for rejection of the defence as an afterthought. Further, whether or not the appellant did attempt to explain to PW4 outside or inside the Travel Control Officer's room at the immigration control post at Bukit Kayu Hitam that the 17 packages found on his body did not belong to him but to someone else was a point of fact. That point was decided by the trial court solely on the oral evidence of the appellant which it heard and on the balance of probabilities by reference to "the normal reaction of any person under similar circumstances". It rejected his evidence that the appellant did attempt to explain in Cantonese for the first time but rather belatedly in cross-examination and not in his evidence-in-chief. If he did explain to PW4 as he said he did, then his right of silence before PW4 no longer applied. Whether the appellant carried the 17 packages on his own behalf or on behalf of someone else was a point directly relevant to the determination of whether he was the trafficker as charged, to the rebuttal of the mandatory presumption under s. 37(da)(i) of Act 234 which already applied

at that stage and also to the duress that he pleaded. And if it was true that he did explain to PW4 that he carried them on someone else's behalf, it was for him to say so frankly and timely in his evidence in chief and not to wait until his cross-examination. Such delay must affect the credibility of or the weight to be attached to that piece of evidence taken alone or together with his other evidence elicited also in cross-examination concerning his air ticket and no bid to escape from the duress because he thought they were trivial matters. In the light of what we just said we were of the opinion that the comments of the trial court in the phrase "rather strangely" and "remarkable" were unobjectionable on grounds of impropriety or unfairness. "Strangely" in that phrase could only have meant "curiously" and the curiosity in that context related to the omission or failure of the appellant as a normal person, a visitor to another country to explain to PW4 and "remarkable" with regard to the appellant's omission or failure to disclose in his examination-in-chief that he did try to explain to PW4. Thus in our view, there was no misdirection and the trial court had not erred in its approach.

The fourth reason for the rejection by the trial court of the appellant's defence of duress was the failure or omission of DW2 to report to the Hong Kong police of the incident which happened on 18 April 1993 in the family apartment in Hong Kong and the unsatisfactory explanation she gave for such failure or omission.

In the first place, was there a necessity to report the alleged incident of 18 April 1993 to the Hong Kong police and who should have reported. According to the evidence of the appellant and DW2 the incident happened at about 2am on 18 April 1993 in the family apartment and in their presence and that of their mother and younger sister. The alleged use of a firearm to extort immediate repayment in full of the loan debt owing to Ah Seng, the threat by Ah Seng to kill the entire family if his demand was not met, the abduction of the appellant and holding him to bondage unless such debt was settled, if true, were all matters of very grave concern affecting the lives and security of the entire family which in our view would well warrant reporting to the Hong Kong police. Allegedly too, the appellant was ordered by Ah Seng to specifically bring his passport and to pack his clothing although nothing was mentioned of the exact nature of the job he was to perform. In our view too, if that was true it was a clear indication by Ah Seng to the appellant and his family members that the job the appellant was required to do, was not in Hong Kong, but abroad, and that he was required to travel. In that situation a report to the Hong Kong police should have been made promptly that same day 18 April 1993 to seek police protection for the family and to pre-empt any move by Ah Seng to take the appellant out of Hong Kong. Since the appellant was

in the custody of Ah Seng, it stood to reason that he might not be able to report to the police himself and that DW2 being the elder sister should have reported the incident promptly to the Hong Kong police.

The question then was whether DW2 did report the incident of 18 April 1993 to the Hong Kong police. DW2 acknowledged throughout her evidence that at no time did she report that incident to the Hong Kong police. She explained that before Ah Seng and his men left the apartment with the appellant, Ah Seng had ordered them not to report to the police, otherwise, he would do something to the appellant. She took that to mean that the appellant would be killed if they reported to the police and in that sense she feared for his safety. Besides, she added, she did not leave her apartment as she had observed four men inside a white car parked on the ground floor of the apartment Block. She suspected that the four men were the same four men in the incident of 18 April 1993. She said that they were there constantly until 2 or 3 May 1993. Those were the reasons why she did not report to the Hong Kong police.

DW2 testified that in early May 1993 she visited the police station in Hong Kong once only after she received a letter from the appellant in Malaysia informing the family that the appellant was arrested and detained in Malaysia for drug trafficking. On that occasion she said that she only informed the Hong Kong police that her brother the appellant was arrested in Malaysia and enquired as to how to go about it. The Hong Kong police responded that they could not do anything and advised her to contact the British High Commission. The trial court then asked if that was all she informed the Hong Kong police to which she answered "yes" meaning that was all. In short, DW2 did not report the incident of 18 April 1993 to the Hong Kong police on that occasion.

Before us, counsel for the appellant argued that the failure or omission of DW2 to report to the Hong Kong police about the incident of 18 April 1993 was not a safe ground to reject the appellant's defence of duress. He pointed out that DW2 did explain why she did not report to the Hong Kong police about the incident of 18 April 1993 when she visited the police station in Hong Kong. As we understood the questions of the deputy public prosecutor at p. 459B and C of the Appeal Record, "laporan" or report therein referred to report to the Hong Kong police about the incident of 18 April 1993 and not a report to the Hong Kong police about the arrest of the appellant in Malaysia. DW2's answer to the question at p. 459B was fairly comprehensible. She answered that she did not know if reporting to the Hong Kong police about the incident of 18 April 1993 was going to be helpful to the appellant; but she did not make such report because she was afraid for the safety of the appellant. In answer to the question at p. 459C; she explained why she did not report to the Hong Kong police about the arrest of the appellant in

Malaysia. To our mind there was no suggestion by the deputy public prosecutor in his question at p. 459C or ever that DW2 should report to the Hong Kong police about the appellant's arrest in Malaysia. As we understood the deputy public prosecutor's question, what he asked was why did she not report to the Hong Kong police about the incident of 18 April 1993 and was she not afraid that the appellant now faced death by hanging. In our view, DW2 did not answer that question; either she misunderstood that question or she was being daft. It was apparent that the trial court was not satisfied with her answer and took it upon itself to question her as to her purpose of going to the police station in Hong Kong after she came to know that the appellant was arrested in Malaysia. She did not answer to the point in question and the trial court had to ask her again what exactly did she inform the police at the police station in Hong Kong. To that DW2 replied that she informed the police that the appellant was arrested in Malaysia and how she was to go about it. The Hong Kong police told her that they could not do anything about it and asked her to contact the British High Commission. As we saw it, DW2 did not explain to the deputy public prosecutor or to the trial court why she did not report to the police in Hong Kong about the incident of 18 April 1993.

It was clear to us that if the incident of 18 April 1993 was true, DW2 should promptly have reported to the police in Hong Kong. Granted that initially she did not so report to the Hong Kong police out of fear for the safety of the appellant and because of the four men in the white car downstairs. After the arrest and custody of the appellant by the Malaysian police on 30 April 1993 there was no more reason to fear for the safety of the appellant who was safe in the hands of the Malaysian police. After the disappearance of the white car by 2 or 3 May 1993 and she was able to visit the Hong Kong police, she should have reported to them of the incident on 18 April 1993 in her family apartment if that was true. DW2 did not any time report that incident to the Hong Kong police and she gave no satisfactory explanation for her failure or omission to so report. It should be obvious that a report to the Hong Kong police, if the incident of 18 April 1993 was true, was very relevant to the appellant's defence of duress. In the premises the trial court was well justified to find that DW2 was not a truthful witness, to disbelieve her evidence and to reject the incident on 18 April 1993 as a fabrication and an afterthought.

Next, based on *Subramaniam v. Public Prosecutor* [1956] 22 MLJ 222, learned counsel for the appellant argued in the alternative:

(1) that the test to determine whether there was reasonable apprehension of instant death to the appellant at the time of commission of the offence should have been the subjective test or partly subjective and partly objective test and that the trial court had misdirected itself on the burden of proof when it applied the objective test;

(2) that the reasons given by the trial court for not holding that the duress was imminent, extreme and persistent, were faulty.

The point raised by the first alternative argument was whether it was necessary for the trial court to consider the surrounding circumstances at the immigration control post at Bukit Kayu Hitam when the appellant was arrested in addition to considering the appellant's state of mind in order to determine whether there was reasonable apprehension of instant death to the appellant at that material time. As we understood counsel, his argument here would seem to be based on a passage in *Subramaniam's* case *(ibid)* at p. 222 wherein the Board stated:

> In the case before their Lordships statements could have been made to the appellant by the terrorists, which, whether true or not, if they had been believed by the appellant, might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

In our view, by that passage, the Board did not establish or apply any test – subjective or otherwise. Indeed, whether it was the subjective test or objective test was not a point at issue in that appeal. The main issue in that appeal was whether the conversation which the terrorists had with Subramaniam in his encounter with them was admissible in evidence. In his defence of duress, Subramaniam had sought to give evidence of his conversation with the terrorists to establish that he acted under threats from the terrorists to wear the belt of ammunition found on him at the time of capture by the security forces. The trial court ruled peremptorily that such conversation was hearsay and inadmissible unless the terrorists were called to give evidence. On that issue the Board held at p. 222:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made. In the case before their Lordships statements could have been made to the appellant by the terrorists, which whether true or not, if they had been believed by the appellant might reasonably have induced in him an apprehension of instant death if he failed to conform to their wishes.

It would be observed that the passage purportedly relied upon by counsel formed part of the holding of the Board and in the context in which that passage was found, its only purpose was to bring home a point namely, the relevancy of such "statements" to the "mental state and conduct thereafter of the witness" present when the statements were made. There was nothing in

that passage to say specifically whether the test was or should be subjective or otherwise or that only his state of mind should be considered in determining whether or not there was reasonable apprehension of instant death. Reference in the holding of the Board to "the mental state and conduct thereafter of the witness" must necessarily involve both the state of mind of the witness and his conduct in relation to the surrounding circumstances at the time of the commission of the offence. On this point, our Supreme Court in *Derrick Gregory v. Public Prosecutor* [1988] 2 MLJ 369 at p. 370 right column G also held that each case would depend on the facts and surrounding circumstances of that particular case. In considering the facts and surrounding circumstances to determine whether or not there was reasonable fear, the presence of the threatener at the time of the commission of the offence must surely have an important effect on the person threatened. In *Mohamed Yusof v. Public Prosecutor* [1983] 2 MLJ 167 at p. 171 left column F, Syed Agil Barakbah J said that in the presence of the robbers (the threateners) it was reasonable for him (the person threatened) to have the apprehension of being killed instantly if he refused to carry out their threat.

Turning to this part of the judgment of the trial court, it was obvious to us that here the trial court was considering the plea of duress on the balance of probabilities although not convinced of its truth previously. It was settled law since *Tan Seng Ann v. Public Prosecutor* [1949] 15 MLJ 87 that a plea of duress under s. 94 of the Penal Code (FMS Cap. 45) to be successful, must be imminent, extreme and persistent at the time of the commission of the offence. The question which concerned the trial court here was whether the appellant might have acted under duress which was imminent, extreme and persistent when he committed the offence on 30 April 1993 at the immigration control post at Bukit Kayu Hitam. The matter crucial to the entire issue of duress was whether Ah Meng's threats of instant death previously uttered to the appellant had caused him reasonable apprehension of instant death if he failed to commit the offence at Bukit Kayu Hitam. In that regard it followed that the threats and their effect on the mind and actions of the appellant had to be considered in the light of the facts and surrounding circumstances at the material time of the commission of the offence. That was what the trial court had done. We reviewed this part of the judgment of the trial court and we were satisfied that there was no misdirection. The starting point of its discussion of the evidence of the appellant in this part of its judgment was the threat uttered by Ah Meng to the appellant in Bangkok that the unidentified Caucasian would kill the appellant if he attempted to escape. Ah Meng was therefore the threatener and not the Caucasian. Under our law of duress the threatener had to be present to execute the threat of instant death or to cause its execution by the Caucasian then and there if the appellant failed to commit

the offence: see *Mohamed Yusof v. Public Prosecutor (ibid)* and see also *R v. Teichelman* [1981] 2 NZLR 64 (CA). Ah Meng himself was not present at the material time. The Caucasian was unarmed, outside the zone and not within sight of the appellant. There were also a number of police officers at the scene attending to the appellant.

In those circumstances there was virtually no likelihood of the threat being executed there and then or of the appellant having acted under duress that was imminent, extreme and persistent at the time of his body search and arrest. In the premises the trial court was not satisfied on the balance of probabilities that duress, if there were one, was imminent, extreme and persistent and also that there was no reasonable basis for the appellant to fear instant death moments before his arrest at the immigration control post. Here, argued counsel in the alternative, the reasons given by the trial court were faulty. Counsel's point here was that it was probable that Ah Meng's threat could have been a continuing menace at or about the time of arrest of the appellant. Though that threat could not be carried out then and there by the Caucasian that should not deprive the appellant from raising the plea of duress as the Board said in *Subramaniam's* case *(supra)* at p. 223. This point should have been considered by the trial court which it did not. He pointed out that there was evidence of not only one Caucasian but several of them. He submitted that there was evidence of duress and that the defence did raise a reasonable doubt.

As we understood *Subramaniam's* case *(supra)* what the Board said there was in relation to a possibility that "the terrorists or some of them" might come back for Subramaniam at any moment. It made sense to us that "the terrorists or some of them" could only have meant the same terrorists who actually threatened Subramaniam in the encounter or some of them and not just any terrorist. That possibility was not unreal during the emergency in Malaya from 1948 to 1960. The communist terrorists were known to come back ruthlessly for their targeted victims and by that tactic instilled fear of death into the minds of their victims into joining or co-operating with them. In the context of our present appeal, such a possibility was unlikely. In the first place, Ah Meng the threatener did not follow the appellant and the Caucasian into Malaysia. He stayed back in Thailand. The question of Ah Meng coming back to Malaysia for the appellant at any moment did not therefore arise if the appellant failed to comply with his wishes.

As for the Caucasian who allegedly accompanied the appellant, he was not the threatener as we said before. There was no evidence from the appellant that the Caucasian ever threatened him at Bukit Kayu Hitam or in the course of the journey. Although seated beside the Caucasian in the van, there was no conversation between them. The Caucasian was unarmed and not unhelpful

towards the appellant. According to the appellant, the Caucasian assisted him to complete the immigration entry form at the immigration control post. There was no evidence to show that the Caucasian was constantly trailing or watching him. If it was true that there was this Caucasian around, we were unable to discern anything in his demeanour or conduct which might reasonably be said to arouse any fear of instant death to the appellant at any moment in the course of the journey or at the immigration control post. The nature of the threat uttered by Ah Meng was that if the appellant attempted to escape, the Caucasian would kill him instantly. The appellant said that he did not try to escape, so there was no cause for the Caucasian to kill him instantly or for him to fear instant death. As regards the possibility of the Caucasian coming back for the appellant in Malaysia at any moment like what was said by the Board of the terrorists in *Subramaniam's* case *(supra)* there was no evidence to suggest that or that such thought ever crossed the appellant's mind. Likewise, there was no evidence to suggest that the appellant was minded to surrender as in *Subramaniam's* case *(supra)* at the time of capture or to seek police protection at or about the time of the appellant's arrest. Consequently, in our view, there was no basis for thinking that the appellant was obsessed with such thoughts at the material time to the extent that he was deterred from surrendering to the police or to seek their protection in Malaysia. As we saw it, more likely than not, his fear and nervousness in those moments stemmed from his guilty knowledge that he was committing an offence by smuggling "gold dust" under his clothes which turned out to be heroin. In the premises we found no merit in this ground of appeal.

Lastly, learned counsel submitted that there was misdirection by way of non direction on the part of the trial court in that the trial court did not, in an exercise separate from its consideration of the plea of duress, consider the question of whether the appellant had rebutted the statutory presumption of trafficking in heroin under s. 37(da)(i) of Act 234 and he cited *Alcontra a/l Ambrose Anthony v. Public Prosecutor* [1996] 1 MLJ 209 (FC) at p. 219H-I, and 221H-I; and the 1st and 3rd holding of the Supreme Court in *Ng Chai Kem lwn. Pendakwa Raya* [1994] 2 CLJ 593 in support of his submission. The requirement of a separate exercise referred to in both cases cited was laid down by the Supreme Court in *Mohamad Radhi bin Yaakob v. Public Prosecutor* [1991] 3 MLJ 169 at p. 172 left column B with one exception namely, where from the evidence in a particular case it was obvious that no separate exercise was warranted.

Counsel's complaint here was limited solely to the lack of treatment by the trial court of the appellant's rebuttal of the presumption of trafficking. The treatment of the nature of the drug ie, heroin and the appellant's knowledge thereof, had been dealt with in the penultimate paragraph of its judgment. As we understood counsel's complaint, the poser was who, in the mind of the trial court, was the trafficker of the heroin – whether he was Ah Seng in Hong Kong, Ah Meng or the Thai man in Bangkok, the Caucasian who accompanied the appellant to Malaysia or the appellant himself. On this, the trial court made its finding of fact when it found the appellant guilty of the charge in the ultimate paragraph of its judgment. The essential ingredient of the charge was that the appellant did traffick in heroin on his own behalf and the finding of guilt meant that the appellant was the trafficker. As no reason was expressly stated for such finding in the ultimate paragraph of its judgment, counsel argued that the trial court did not separately apply its mind to the rebuttal of the presumption under s. 37(da)(i) of Act 234.

The gist of the appellant's rebuttal was that he was a reluctant carrier of gold dust but not a trafficker of heroin. "Reluctant" because he carried under duress by threats. If anyone was the trafficker of heroin, he was Ah Seng in Hong Kong, Ah Meng or the Thai man in Bangkok or the Caucasian who accompanied him to Malaysia but not him. In rejecting the plea of duress as untrue and improbable, the trial court dealt with the point whether Ah Seng, Ah Meng, the Thai man and the Caucasian was fact or fiction and concluded that they were all fictitious figures invented by the accused and DW2. Had it not come to that conclusion, we would respectfully agree with counsel that it would then be incumbent upon the trial court to consider in a separate exercise who was the trafficker of heroin within the meaning of "trafficking" in s. 2 of Act 234, whether the appellant was trafficking on his own behalf or on behalf of any one of them and whether the doctrine of wilful blindness applied to the appellant. But by reason of the conclusion it reached, based entirely on the credibility of the appellant and DW2 which it assessed, those issues did not arise anymore. A separate exercise as counsel submitted in the light of its conclusion must entail a review by the trial court of the same evidence once more which with respect, would serve no useful purpose. In our view, the evidence in the present case came within the exception to the requirement in *Mohamad Radhi's* case *(supra)* that was to say, no separate exercise was warranted.

For all these reasons stated, we made the decision mentioned in the opening paragraph of this judgment.